

STATE OF MAINE  
PUBLIC UTILITIES COMMISSION

Docket No. 98-608

February 3, 1999

PUBLIC UTILITIES COMMISSION  
Licensing Requirements,  
Enforcement and Consumer Protection  
Provisions for Competitive Electric  
Providers (Chapter 305)

ORDER ADOPTING  
RULE AND STATEMENT OF  
FACTUAL AND POLICY  
BASIS

WELCH, Chairman; NUGENT AND DIAMOND, Commissioners

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## **I. INTRODUCTION**

In this Order, we adopt a final rule that establishes licensing criteria and procedures, annual reporting requirements, enforcement provisions, and consumer protection standards for the competitive provision of generation services.

During its 1997 session, the Legislature fundamentally altered the electric industry in Maine by deregulating electric generation services and allowing for retail competition beginning on March 1, 2000.<sup>1</sup> At that time, Maine's electricity consumers will be able to choose a generation provider from a competitive market.

The Legislature recognized that it was allowing for customer choice in an industry historically characterized by the monopoly provision of service. As such, consumers have had no previous experience in purchasing electricity services within a competitive market. For this reason, the Legislature enacted specific provisions governing competitive provider licensing and consumer protection to encourage effective competition, promote an orderly transition, and protect consumers from fraud and other unfair or deceptive business practices.

## **II. STATUTORY PROVISIONS**

The licensing and consumer protection provision are contained in section 3203 of Title 35-A. Subsections 3203(1) and (2) require the Commission to license competitive providers and generally establish information that must be provided by a license applicant. Subsection 3203(2) also requires the

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<sup>1</sup>An Act to Restructure the State's Electric Industry (the Act), P.L. 1997, ch. 316 (codified as chapter 32 of Title 35-A M.R.S.A. §§ 3201-3217).

Commission to consider the need for a bond as evidence of the financial capability to provide service. Subsections 3203(4), (6) and (8) establish general consumer protection standards for customers with a demand of 100 kW or less, and require the Commission to promulgate and enforce consumer protection rules and resolve customer disputes regarding those rules. Subsection 3203(15) directs the Commission to consider requiring standardized information on bills for competitive generation service.

Subsections 3203(5), (7), (10), (11), (12) and (13) direct the Commission to enforce the provisions of section 3203. The Legislature explicitly authorized the Commission to make use of a variety of options in fulfilling its enforcement responsibilities. These are: license revocation, imposition of monetary penalties, issuance of cease and desist orders, ordering restitution, taking court action, and notifying the Attorney General.

The Legislature also generally authorized the Commission to impose by rule other requirements necessary to carry out the purposes of the Act. 35-A M.R.S.A. § 3203(9).

Pursuant to 35-A M.R.S.A. § 3203(17), the rules established in this proceeding are routine technical rules.<sup>2</sup>

### **III. THE RULEMAKING PROCESS**

On August 25, 1998, we issued a Notice of Rulemaking and proposed rule regarding licensing requirements, enforcement and consumer protection provisions for competitive electric providers (Chapter 305). Prior to initiating the formal rulemaking process, we conducted an Inquiry in Docket No. 97-590 into the issues that would be presented in this rulemaking. The comments received in the Inquiry phase aided in the development of the proposed rule.

Consistent with the rulemaking procedures, interested persons were provided an opportunity to provide written and oral comments on the proposed rule. A public hearing was held on September 23, 1998 at the Commission's Hearing Room in Augusta

<sup>2</sup>Subsection 3203(3) requires the Commission to adopt rules governing competitive provider information disclosure and informational filings. The subsection specifies that such rules are major substantive rules. The Commission has initiated a rulemaking for these rules in Docket 98-708, Chapter 306.

and written comments were accepted until October 5, 1998. The Commission received comments (either oral or written or both) from the following interested persons and organizations: Public Advocate, MainePower, Central Maine Power Company (CMP), Maine Public Service Company (MPS), Green Mountain Energy Resources (GMER), EnergyExpress, Enron Energy Services, AllEnergy Marketing Company, Hydro Quebec (HQ), Weil and Howe, Inc., and Pamela Prodan.

The Commission appreciates the comments on the issues presented in this rulemaking. The comments were extremely helpful in the consideration of the proposed rule and we have incorporated many of the comments and concerns into the final rule we adopt today.

#### **IV. DISCUSSION OF INDIVIDUAL SECTIONS AND COMMENTS**

In this section of the Order, we discuss the individual sections of the final rule, positions of the commenters, and our rationale for either maintaining or modifying the provisions of the proposed rule. In developing the final rule, we were guided by the statutory provisions in section 3203, the comments received in our Inquiry and formal rulemaking process, as well as the licensing and consumer protection rules adopted by California<sup>3</sup>, Massachusetts<sup>4</sup> and Pennsylvania.<sup>5</sup> All three states have adopted rules that reflect their statutory directives, but the policy pronouncements by these Commissions have been useful in our consideration of similar policies in Maine. In particular, we have relied where possible on the approach adopted by the Massachusetts Department of Telecommunications and Energy so as to promote a uniform set of procedures and rules for providers who seek to operate throughout the New England market. Such an approach should help reduce the cost of providing service in Maine and encourage providers to enter the Maine market.

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<sup>3</sup>California Public Utilities Commission, Opinion Regarding Consumer Protection, D. 98-03-072 (March 26, 1998).

<sup>4</sup>Massachusetts Department of Telecommunications and Energy, Rules Governing the Restructuring of the Electric Industry( 220 CMR 11.00), DPU/DTE 96-100 (February 20, 1998).

<sup>5</sup>Pennsylvania Public Utilities Commission, Re: Licensing Requirements for Electric Generation Suppliers, 52 Pa. Code, Chapter 54 and § 3.551, Final Rulemaking Order, Docket No. L-00970129 (April 24, 1998).

A. Section 1: General Provisions and Definitions

Section 1(A) states the general scope of the rule. The rule applies to competitive electricity providers, which includes marketers, brokers, aggregators, and other entities selling electricity at retail.

Subsection 1(B) contains the definition of terms used in the rule. We have modified this subsection from the proposed rule in several respects.

The proposed rule defined "affiliated interest" by reference to the definition contained in Title 35-A. 35-A M.R.S.A. § 707(1)(A). Because this statutory provision refers to "public utilities," we have removed the reference and replaced it with language that specifically refers to applicants and licensees.

The definition of "broker" is modified to make it consistent with the definition of "aggregator." The proposed rule modified the statutory definition of aggregator to clarify that an entity engaging in the direct sale of electricity to retail customers is not subject to the rule's exemptions for aggregators and brokers. By adding similar language to the definition of broker, we ensure that all providers that have a direct sales relationship with retail customers will be subject to the rule's provisions, regardless of whether they technically take title to electricity.

We have added the term "enroll" to the definition section. Enrollment refers to the process of assigning customers to competitive providers and is the subject of a separate Commission rulemaking, Chapter 322. Use of the term in this rule helps clarify several requirements of the Chapter.

Finally, we have specified that "generation service" as used in the rule refers to a retail service.

B. Section 2: Licensing Requirements and Applicability

1. Section 2(A): Entities Subject to Licensing Requirements

Section 2(A)(1) requires all competitive providers, including aggregators, brokers and marketers to obtain

a license from the Commission before providing retail service in Maine. Because of the nature of their business and lack of direct sales relationship with customers, many of the specific licensing requirements do not apply to aggregators and brokers.

We have added language to remove ambiguities regarding the precise activities that cannot occur without having first received a license. The rule now specifies that entities must have a license before contracting or offering to contract with a customer to provide generation service, enrolling customers pursuant to Chapter 322, providing service, or arranging for a generation service contract. The prohibition on these activities explicitly begins 75 days after the effective date of the rule. Entities are currently able to contract to provide generation service after March, 2000, if they are registered with the Commission pursuant to P.L. 1997, ch. 447 sec. A-1. The 75-day provision is intended to avoid interrupting lawful activities of registered entities by providing sufficient time to obtain a license pursuant to this rule.<sup>6</sup>

Section 2(A)(2) clarifies that transmission and distribution (T&D) utilities that arrange for standard offer service pursuant to the provisions of Chapter 301 are not subject to the licensing requirements.

2. Section 2(B): Application Requirements for  
Competitive Providers

a. Financial capability

Section 2(B)(1) contains the requirements for an applicant's showing of financial capability, as required by 35-A M.R.S.A. § 3203(2)(A). The section requires that competitive providers furnish a surety bond or a letter of credit approved by the Commission. The Commission is authorized by 35-A M.R.S.A. § 3203(2) to require a bond or other evidence of the provider's "ability to withstand market disturbances or other events that may increase the cost of providing service or to provide for uninterrupted service to its customers if a competitive electricity provider stops service." We have made a number of changes to this provision from the proposed rule. In particular, we appreciate the comments of the Public Advocate in this regard whose proposals we have adopted to make clear a

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<sup>6</sup>Upon issuance of the rule, we will notify all entities that have registered with the Commission of the need to obtain a license.

number of technical requirements so as to assure that the security instrument, whether a surety bond or an irrevocable letter of credit, can be relied upon by the Commission without the potential for litigation. Many of the Public Advocate's comments and recommendations are based on the experience of Maine's Bureau of Insurance in its licensing program.

We have set forth two alternative security requirements: a surety bond issued by an insurer authorized to do business in Maine; or an irrevocable standby letter of credit issued by an authorized financial institution. In either case, the security instrument must be actionable by the Commission without further litigation or court involvement, a key consideration to the revisions we have made to the proposed rule.

We have also reduced the initial level of security required from \$250,000 in the proposed rule to \$100,000, and retained the proposed rule's provision for a waiver of this amount based on evidence from the applicant. The revision in the initial year's amount reflects the comments of MainePower, GMER and HQ that the proposed amount (\$250,000) was too high for Maine's relatively small market. In our view, the \$100,000 figure will be sufficient. After the initial year, the amount of the security will be adjusted to equal 10% of the licensee's annual revenue for sales to Maine customers of 100 kW or less (revenue for this purpose does not include that from standard offer service). The security level is limited in this way because it is the smaller customers that the security requirements (as well as our other customer protection provisions) are intended to protect.

We have also, in response to the comments of HQ, made the security requirement applicable only to those providers who market the sale of electricity to consumers who are protected by the consumer protection rules; that is, customers with a demand of 100 kW or less. We find this suggestion reasonable, because the purpose of the financial security is to protect customers who are less able to protect themselves through individualized contract terms in a competitive market.

The rule states the reasons for which the bond or letter of credit proceeds may be ordered paid as: refund of security deposits or advance payments; restitution of amounts paid in error, by mistake or unlawfully obtained; or payments of fines or other penalties. We have deleted the provision in the proposed rule that would apply the proceeds of a defaulting

provider's security instrument to meet the obligations of the affected standard offer provider. Although the Public Advocate supported the provision, MainePower, GMER, HQ, AllEnergy and EnergyExpress opposed it, stating that the security interest should be to protect customers, not providers, and that standard offer providers (as set forth in the Commission's rules) should bear the risks involved in standing ready to provide service to an unknown number of customers who will need this service for a variety of reasons. In deleting the provision, we are also mindful of the difficulty in attempting to determine the incremental costs associated with serving customers who default to standard offer service as a result of a sudden failure of a provider.

Finally, the rule specifies that aggregators and brokers are not required to provide a security instrument, but should include other applicable financial information. At the suggestion of Weil and Howe, the type of evidence that aggregators or brokers may submit has been expanded to include evidence of professional responsibility. The final rule also adds a provision specifying that the security instrument requirements do not apply to standard offer providers, who are subject to the Commission's standard offer rule's financial security requirements (Chapter 301).

Section 2(B)(1)(d) contains requirements for the submission of additional financial information. The final rule is amended to delete the proposed rule's requirement that the applicant submit the level of capitalization or corporate parental backing provided to the applicant. MainePower commented that this information is not necessary in light of our requirements for financial security. We agree. However, if an applicant seeks a waiver of the requirement for a surety bond or letter of credit, this information may be relevant. We have also modified the additional information requirement to clarify the specific entities associated with the applicant that must provide bankruptcy information.

b. Technical capability

Section 2(B)(2) establishes the requirements for an applicant's showing of technical capability, as required by 35-A M.R.S.A. § 3203(2)(B).<sup>7</sup> The section specifies that an

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<sup>7</sup>Several commenters suggested these provisions are vague in that they do not specify what information must be filed. We have not added more specific requirements so as not to unnecessary

applicant demonstrate its technical ability to enter into any necessary contracts with T&D utilities. For example, an owner of a generation facility may be required to execute an interconnection agreement, and competitive providers responsible for retail load may be obligated to enter a "service agreement" with utilities. Under the final rule, the Commission may issue a license before required agreements are executed. This would allow a licensee to contract with a customer to provide service, but the licensee could not enroll customers (pursuant to the provisions of Chapter 322) or actually provide service until all required contracts are entered.<sup>8</sup>

This section also requires applicants to demonstrate their technical ability to deliver electricity through compliance with all applicable NEPOOL and ISO-NE rules; applicants that will serve northern Maine must show compliance with rules applicable to providing retail generation service in northern Maine. The proposed rule referred generally to the applicable rules of the Maritimes control area. HQ expressed concern about this general reference, and suggested there be a limit to "technical" requirements. We have limited the provision in this manner. We have not eliminated the provision that requires licensees to be a NEPOOL participant or have a contract with a participant. Although HQ and Enron suggested this provision would be duplicative of the requirement to comply with NEPOOL and ISO-NE rules, our view is that an applicant's technical ability to provide retail service according to our rules is enhanced if it is a NEPOOL participant or has a contractual relationship with a participant. Finally, the specific provisions of the paragraph do not apply to aggregators and brokers, but these entities must submit information that

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limit the type of information that may be relevant in considering technical capability. Additionally, because electricity markets are emerging, it is difficult to specify the precise technical capability information appropriate for licensing. Our view is that a variety of information would be sufficient, such as experience in wholesale or retail electricity markets in other states.

<sup>8</sup>The need for and terms of required "service agreements" between providers and utilities are being examined in a separate proceeding. See *Notice of Rulemaking* (Chapter 322), Docket No. 98-810 (Nov. 30, 1998). This rule may also include provider training requirements that must occur before enrolling customers or actually providing generation.



otherwise demonstrates their technical fitness to conduct the proposed business.

c. Disclosure of enforcements and complaints

Section 2(B)(3), as required by 35-A M.R.S.A. § 3203(2)(C), requires applicants to disclose information about enforcement proceedings and customer complaints relating to the applicant or associated entities. Except for felony prosecutions and convictions, the required information is limited to those enforcement actions, or customer complaints concerning the sale of electricity, business fraud, or unfair or deceptive trade practices. The applicant is required to submit customer complaint data that is available from other state licensing agencies, state Attorney General Offices, or other governmental consumer protection agencies. In response to comments by Enron, MainePower, and the Public Advocate, we have clarified that the types of enforcement actions reported must include both civil actions (within the last 12 months) and criminal prosecution and convictions (within the past 6 years). Because the disclosure requirement is limited to information that concerns the sale of electricity, unfair or deceptive business practices or felony convictions, it is directly probative of the applicant's qualifications to do business with retail consumers in Maine.

We have modified the rule to remove the distinction between "formal" and "informal" complaints. This distinction could create confusion depending on how other states maintain complaint data. Instead, the rule now refers generally to the number of "customer complaints," information that the applicant can obtain from the appropriate agency without regard to Maine specific definitions. We understand that the number of complaints alone provides little information on whether the applicant is fit to obtain a license; however, the data (which is required by statute) may be useful in signaling the need for further investigation. We have also modified this section to clarify the entities subject to the disclosure requirement. Several commenters opposed the breadth of this reporting with respect to individuals; however, we are mindful of the experience in the telecommunications industry in which certain individuals have been involved in numerous enforcement actions with respect to their ownership or operation of many separate corporations. It is important that we track the enforcement experience of those active in the retail sale of electricity in other states without regard to the existence of a "corporate veil."

d. Portfolio requirement

Section 2(B)(4), as required by 35-A M.R.S.A. § 3203(2)(D), provides that an affiliate must submit evidence of its ability to satisfy the renewable resource portfolio requirement under 35-A M.R.S.A. § 3210, consistent with the Commission's portfolio requirement rule, Chapter 311. The provision is not applicable to aggregators and brokers. This section is unchanged from the proposed rule.

e. Affiliates

Section 2(B)(5), as required by 35-A M.R.S.A. § 3203(2)(E), requires the applicant to identify its affiliates. The final rule specifies that the requirement applies only to affiliates operating in the United States or Canada. This limitation should respond to the concerns of several parties that the proposed rule's reporting requirement in this regard would be overly broad. These commenters suggested geographic limitations, as well as restricting the requirement only to corporate parents and subsidiaries. The Public Advocate opposed significant limitations, noting the ease and frequency in which legal entities can be created, dissolved, renewed, or merged. By limiting affiliate requirement to entities engaged in electricity sales within the United States and Canada, the burden of compliance should be substantially reduced, while providing the Commission with information relevant to its licensing obligations. We have added a provision specifying that, at the request of the Commission, an applicant must submit additional information regarding its or an affiliate's corporate structure.

f. Consumer protection

Section 2(B)(6) of the proposed rule required applicants to demonstrate their ability to "comply with the Commission's applicable requirements." MainePower, GMER and HQ criticized the provision as vague and highly subjective, potentially creating a source of license application denials. The final rule is modified to clarify that an applicant must submit some evidence to demonstrate its ability to comply with the consumer protection rules contained in this Chapter. Consequently, the provision only applies to applicants that will serve customers with a demand of 100 kW or less. The Commission's intent with respect to this provision is to allow applicants a wide latitude in the type and quality of evidence submitted in this regard. The applicant should submit any

evidence that shows its understanding and ability (e.g., staffing levels, training programs, experience in other states) to comply with the minimum consumer protections required by the Legislature and this Chapter based on the type of services and customers the applicant intends to serve.

g. General information

Section 2(B)(7) lists other general information that must be included in a licensee application. We have clarified item (f) of the section to respond to concerns by MainePower, Enron and GMER that the proposed rule would require confidential business information. This is not the Commission's intent. The final rule makes clear that the applicant is only required to list those generic products or services that it intends to market in Maine (with the understanding that the licensee may amend or delete this list at any time) and the customer classes to which it initially intends to direct its efforts. The latter information will be necessary to establish the required security interest and will be an important source of information to the Commission concerning the development of a competitive electricity market for residential and small commercial consumers. The Commission is not requiring the applicant's business plan or other confidential marketing information.

In response to commenter objections, we delete, as unnecessary, the requirement that the applicant submit an affidavit that it will comply with applicable rules (item (g) of the proposed rule). We have also deleted the requirement that the applicant identify any billing agents. MainePower commented that the requirement would be unnecessary and reveal confidential business information. We agree that requiring the identity of a billing agent as part of the license application is not necessary. We have, however, added a general provision to section 4 of the rule requiring all agents or representatives of competitive providers to comply with applicable consumer protection rules.

We have added provisions requiring applicants to list all jurisdictions in which they or their affiliates are licensed to sell electricity, or in which they or their affiliates have applied for authority to sell electricity. This information will facilitate any investigation of an applicant's fitness to operate in Maine.

h. Jurisdiction

We have added a new provision, section 2(B)(8), to clarify the jurisdictional "rules" that the applicant must accept when it receives a license to sell electricity at retail in Maine. This provision was suggested by the Public Advocate. The provision specifies that the licensee submits to the jurisdiction of Maine courts and the Maine Public Utilities Commission, and agrees that retail contracts with customers of 100 kW or less will be interpreted according to Maine law.

3. Section 2(C): Licensing Procedures

Section 2(C) contains the procedures for the Commission's licensing process. Several changes have been made to the final rule in response to comments which sought to clarify the license application procedures.

Sections 2(C)(1) and (2) of the final rule state the scope of the licensing procedures and require the use of a Commission application form. These provisions are unchanged from the proposed rule.

Section 2(C)(3) establishes the number of applicant forms that must be filed with the Commission and specifies that copies must be provided to the Public Advocate. For reasons discussed below, we have deleted the requirement that copies be provided to a predetermined service list and the T&D utilities.

Section 2(C)(4) has been amended to clarify that the applicant must report any material change in the provided information while the application process is pending. The proposed rule also contained an ongoing obligation for a licensee to report changes in its "organization structure or operation." Because this is an ongoing informational requirement, we have moved it to the reporting section and, in response to comments, have narrowed the requirement to changes related to the ownership or control of licensee.<sup>9</sup>

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<sup>9</sup>The proposed rule would have required a report of the change within 30 days. The final rule makes the obligation part of the annual reporting requirement.

Section 2(C)(5) requires the applicant to submit a filing fee intended to cover the Commission's routine administrative costs to process and issue the license, and to encourage applications only from serious applicants. We received no comments on this provision and it is unchanged from the proposed rule.

Sections (2)(C)(6) and (7) establish the procedure for notice and review of the license application.<sup>10</sup> Upon receipt of a license application, the Commission will place notice of the pending application on its website. The Commission will review the application and may seek additional information from the applicant. Within 30 days, the Commission will take one of three actions: issue the license, deny the license, or subject the application to formal investigation, in which case the Commission will provide notice to interested persons. This period may be extended for an additional 30 days by the Administrative Director.

Our view is that a substantial majority of the applications will be relatively routine, and we will thus be able to review them without a formal opportunity for interested parties to protest or provide input.<sup>11</sup> For this reason, it appears unnecessary to require broad service of the application to interested persons and establish a formal protest procedure as contemplated in the proposed rule. To the extent our review reveals significant questions as to whether a license should issue, we will initiate a formal investigation and provide notice to interested persons. This approach responds to concerns by GMER, HQ, MainePower, and EnergyExpress that broad distribution of licensee applications and opportunity for protest would complicate and unnecessarily delay the licensing process. MainePower and EnergyExpress also commented that a 60-day review process is too long. As noted above, we expect most of the applications to be routine, and it is therefore likely that many applications will be processed within the initial 30 day review process. However, because the market is developing and the task

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<sup>10</sup>Under the final rule, the Commission is not required to publish notice of the application for a license in the newspaper. Maine's Administrative Procedures Act, Subchapter V, Licensing, 5 M.R.S.A. §§ 10001-10005, does not require publication of license applications and requires a hearing only if otherwise required by constitutional right or statute.

<sup>11</sup>We will review any information that is provided to us during the application process.

of licensing is a new one for the Commission, a maximum 60 day period is a reasonable time to complete the review of the application.

Section 2(C)(8) states the criteria for the issuance of a license. We have added language to clarify that the license will be granted unless the applicant fails to comply with the application requirements, does not have the requisite financial and technical capability, or sufficient reason exists to find that a license is not in the public interest.

Section 2(C)(9) specifies that a license remains valid until revoked or abandoned. In our view, there is no need for a term for licenses with the attendant renewal requirements. Most commenters supported the proposal for a license that is valid unless revoked or abandoned.

Section 2(C)(10) provides that licenses cannot be transferred without prior Commission approval. We added a provision stating that the Commission may require the licensee to notify affected customers of a license transfer.

Section 2(C)(11) prohibits a licensee from abandoning service without adequate notice to the Commission, customers and the utilities. In response to a proposal by MainePower and HQ, section 2(C)(11) of the final rule specifies that the requirement for 30-day prior notice of abandonment applies to licensees with consumers with a demand of 100 kilowatts or less. Notice of abandonment of service for larger customers will occur according to contractual commitments.<sup>12</sup>

Finally, section 2(C)(12) refers to the penalty provisions that will apply to any applicant that knowingly submits false, misleading, incomplete or inaccurate information on its license application.

#### 4. Section 2(D): Annual Reporting

This section of the rule contains the requirement for the annual reporting of information. There are several purposes for requiring the specified information. These include the monitoring of the operation of the generation services market, the annual modification of the financial security

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<sup>12</sup>The Commission may, in appropriate situations, determine the circumstances that constitute license abandonment.

requirement, tracking compliance with consumer laws and regulations, and ensuring compliance with Commission rules. The section specifies the reporting period to be a calendar year, and requires information on average prices, revenues, customer complaints, and enforcement actions, as well as information disclosure and portfolio reporting required by other rules (Chapter 306 and 311, respectively). Aggregators and brokers are not subject to the annual reporting requirements, except for customer complaints and enforcement actions but must provide any additional information the Commission may require. We have added similar language exempting standard offer providers from the reporting requirements, as inapplicable, except for those required by the uniform disclosure rule (Chapter 306) and portfolio requirement rule (Chapter 311). Finally, the section specifies that the Commission will provide for the confidentiality of information through appropriate protective order.

MainePower and GMER expressed concern over sensitive business information that may be part of the annual report or the license application. The Commission understands that the generation markets will be competitive and, as a result, some of the information required to be in the annual reports will likely be sensitive. As in the past, the Commission will act to protect materials that are legitimately claimed as confidential. With respect to the license application, we have attempted to structure the information requirements so that confidential business information would not need to be submitted. To the extent that application information is sensitive, an applicant may request a protective order.

### C. Section 3: Sanctions and Enforcement

This section of the final rule contains the sanctions and enforcement mechanisms that the Commission may use to ensure competitive provider compliance with all applicable statutes and rules. As specifically authorized by the Legislature, 35-A M.R.S.A. § 3203, the proposed rule allows the Commission to impose the following sanctions: monetary penalties (up to \$5,000 per day for each violation); cease and desist orders; restitution; and license revocation or suspension. The section also provides that the Commission may impose any other legally authorized sanctions or waive sanctions upon a showing of good faith effort to comply. Finally, the section contains enforcement provisions allowing the Commission to take court action or notify the Attorney General of certain unlawful acts.

The Public Advocate provided the only comment on these provisions. He suggested that the final rule contain a list of the criteria, modeled on other state licensing programs, upon which a license could be revoked. We agree with the Public Advocate that identifying these criteria for applicants is appropriate, particularly in light of the rule's adoption of an indefinite license term. We have also added language specifying that license suspension is an enforcement option, and that the Commission may choose to suspend only a provider's ability to sign-up new customers.<sup>13</sup>

D. Section 4: Consumer Protection

1. Section 4(A): Applicability

Section 4(A)(1) specifies that all the consumer protection provisions of section 4 apply to service to residential and commercial customers with a demand of 100 kW or less. The Act contains a list of standard protections that must apply to customers of 100 kW or less, 35-A M.R.S.A. § 3204(4), and authorizes the Commission to adopt additional consumer protection rules, 35-A M.R.S.A. § 3203(6). Because larger use customers are likely to be more sophisticated purchasers of electricity and should be able to demand necessary protections as part of their contract terms, we see no reason to apply the customer protection rules to customers with demands beyond 100 kW. This section contains the criterion for determining customer demand for purposes of the rule.

In response to comments, we have clarified the means by which competitive providers will ascertain the customer demand status and thus eligibility for the rule's consumer protections. In the event the utility's rate class tariff definitions identify customers as above or below 100 kW, providers can rely on this information. If the tariff definition does not allow for identification, the provider determines eligibility through prior usage data; if the customer's maximum average demand over the prior 12 months is 100 kW or less, the customer is eligible for protection. Although a 12-month average is not the method used to assign customers to rate classes, it is straight forward, a reasonable means to identify customers

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<sup>13</sup>This option would allow the Commission, when appropriate, to suspend a provider's license to expand operations, without relieving the provider from its then existing contractual obligations.



eligible for customer protections. If data is incomplete or the determination requires judgment, the provider is required to make a reasonable effort to determine the customer's status. The determination is made at the time of enrollment. Utilities are required to provide reasonable assistance in identifying eligible customers, but the responsibility for appropriate identification falls to providers.

Section 4(A)(2) states that the consumer protection requirements do not apply to standard offer service, unless otherwise indicated. This is because standard offer providers do not actually market to customers and most customer communications will occur with the utility.<sup>14</sup>

We have added several new provisions. Section 4(A)(3) specifies that the customer protection requirements are not applicable to aggregators and brokers. Section 4(A)(4) states that specifies that the consumer protection obligations and requirements apply to agents and representatives acting on behalf of competitive providers, and that providers will be responsible for their agents' or representatives' non-compliance with Commission rules. Finally, we have added a new section 4(A)(5) to clarify that consumers cannot waive any provisions of this rule and that such waivers are null and void. We requested comments on this issue in our Notice of Rulemaking. The Public Advocate supported prohibiting customer waivers, and no person suggested that consumers should be able to waive their consumer protection rights.

2. Section 4(B): Provision of Information to Customers

Section 4(B) requires each competitive provider to prepare and distribute a document entitled "terms of service" to its customers within 30 days of initiating service and annually thereafter. The Commission views the terms of service document as the method by which customers are informed about the details of their contract with providers, accordingly it must contain the

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<sup>14</sup>We are cognizant that standard offer providers will not have expenses associated with these consumer protection requirements that competitive providers will bear and that this would tend to make it more difficult for competitive providers to attract customers away from the standard offer. We accordingly have sought to minimize the cost of compliance to the extent consistent with our consumer protection responsibilities.

"material" terms of the contractual relationship. In addition, the delivery of the terms of service document triggers the customer's 5-day right of rescission as required by 35-A M.R.S.A. § 3203(4)(C). While the statute requires the provider to provide these disclosures within 30 days of initiating service, our rule links the provider's ability to notify the T&D utility of the customer's selection of a new provider with the provider's compliance with the issuance of the terms of service document and the expiration of the right of rescission.

The final rule does not contain a list of items that must be included in the terms of service document. Such a list was included in the proposed rule; however, MainePower argued that this provision should be included in a major substantive rule conducted pursuant to 35-A M.R.S.A. § 3203(3).<sup>15</sup> As a result, we have deleted the list of specific items from this rule and will consider the contents of the terms of service document in our pending major substantive rulemaking on uniform information disclosure (Chapter 306, Docket No. 98-708).<sup>16</sup>

The proposed rule required competitive providers to provide the terms of service document to customers each year and upon request. MainePower and EnergyExpress stated that this requirement was unnecessary and would be expensive. In response, the final rule requires only that providers annually notify customers of their ability to obtain the document; they must provide the document upon request of customers eligible to receive the service in question.

We have also added a provision stating that, if written solicitations contain the terms of service disclosures, any acceptance of service through mailing back a card or some other portion of the solicitation materials must allow the customer to retain the disclosures. We added this requirement to ensure that customers have the ability to refer to their terms of service after choosing a provider.

### 3. Section 4(C): Right of Rescission

<sup>15</sup>MainePower also argued that other requirements in this rule should be in a major substantive rulemaking. However, it is only the informational provisions required by 35-A M.R.S.A. § 3203(3) that must be implemented through major substantive rules.

<sup>16</sup>In our Notice of Rulemaking regarding Chapter 306, we stated that persons may reference their comments on the Terms of Service document made in this proceeding.

Section 4(C) governs the customer's right of rescission pursuant to 35-A M.R.S.A. § 3203(4)(C) and specifies how competitive providers must inform customers of this right and how it may be exercised. As mentioned above, the provider's ability to begin the enrollment process with the T&D utility is linked to the provision of this right of rescission as part of the terms of service document. To allow for the transmittal of the document to the customer in the mail, the provider must wait 8 calendar days after mailing the terms of service document prior to notifying the T&D utility of the customer's choice of provider; a provider must wait 5 calendar days if the document is sent to the customer electronically. As required by 35-A M.R.S.A. § 3203(4)(C), the rule is intended to provide customers with a 5-day period during which to rescind the choice of provider either orally or in writing. To enhance the customer's understanding of the right to rescind within the required period of time from the mailing of the terms of service document, the subsection requires competitive providers to notify prospective customers of their rescission right at the time of orally agreeing to take service.

In response to comments from MainePower, CMP, EnergyExpress and GMER, we have modified the final rule to shorten the proposed rule's 11 calendar day time period during which a customer may exercise a right of rescission. The intent of the proposed rule's 11-day period was to allow 3 days each for the mailing of the document to the customer and the mailing of the customer's written rescission to the provider. However, a customer may rescind by phone and electronically and 11 days is a long waiting period before starting the process by which customers become assigned to their chosen providers. A customer has a statutory right of 5 days within which to exercise the right of rescission. This period will not begin until the customer can reasonably be expected to have actually received the written notice of the contractual terms (i.e., terms of service document), including how to exercise the right of rescission. Therefore, the rescission deadline is based on the customer's probable receipt of the contractual terms after the provider mails the document (8 calendar days) or sends it electronically to those customers who agree to receive information in this manner (5 calendar days). As suggested by GMER, the final rule specifies that a customer may exercise the rescission right electronically, in addition to orally and in writing.

GMER and MainePower raised concern that the terms of service document (which contains the rescission information) not have to be "customized" for individualized customers. For this reason we have removed the requirement that the rescission information specify the time by which the right must be exercised. We have deleted also the proposed rule's requirement that written solicitations contain notice of the customers' right of rescission. The provision is unnecessary because a provider cannot begin service until a customer is provided a term of document that contains notice of the right of rescission. Finally, we have clarified that providers must comply with the waiting period before initiating the enrollment process.

4. Section 4(D): Verification of Affirmative Customer Choice

Section 4(D) contains the provisions applicable to a customer's selection of a provider and responds to the need to prevent what is commonly referred to in the telephone industry as "slamming;" that is, the change of a competitive provider without the customer's authorization. The general approach of the rule is based on the assumption that the customer's relationship with a provider must result from a contact between the customer and the provider, and that the provider must maintain sufficient evidence to establish the customer's authorization.

The final rule allows such authorization to be demonstrated by written signature of the customer, or oral verification by an independent third party. In keeping with the experience in the telecommunications industry where slamming has become a major cause of customer complaints, a customer's authorization cannot be obtained on the same document as a check, prize or other document which intends to confer a benefit on the customer for choosing a specific provider. Our final rule matches that adopted in Massachusetts for electric competition and, therefore, promotes a uniform system of verifying customer authorization that should reduce the burden of compliance for New England-wide energy providers.

The final rule also contains a detailed description of how customer complaints concerning unauthorized switching will be handled and sets forth the stringent standard that customers, who have in fact been determined to have been switched without proper authorization, will not owe any charges to the provider who violates these rules.

No person opposed these verification provisions. We have modified the proposed rule to specify that providers may not initiate the enrollment process without affirmation, that a letter of authorization may be transmitted by the customer electronically, and that any person may file a complaint under the section's provisions. We have also deleted the provision for refunds to the original provider so as to avoid paying the provider for a service that it did not provide, and to prevent a disincentive for providers to act to prevent slamming. Finally, we have deleted the provision on minimum sanctions to maintain maximum flexibility in light of our inability to foresee all circumstances and appropriate responses. We emphasize, however, that we will not tolerate willful slamming, and will take swift steps to halt the practice pursuant to the general enforcement provisions of this rule.

5. Section 4(E): Minimum Service Period

Section 4(E) contains the statutory requirement, 35-A M.R.S.A. § 3203(4)(B), that providers must offer at least a 30-day minimum contract term to customers. There were no comments to this section and it is unchanged from the proposed rule.

6. Section 4(F): Notice of Changes in Material Terms and Conditions; Contract Renewal

Section 4(F) requires competitive providers to give their customers between 30 and 60 days notice of a change in the material terms of their contract, the existence of an automatic contract term renewal provision contained in the contract, or the need for the customer to either renew or select another provider prior to the end of the contract term. The purpose of these provisions is to ensure that customers are aware of upcoming changes, contract term renewals or end of the contract term in sufficient time to take steps to cancel, renew or select another provider. Whether a provider can change the terms of a contract with a customer during the contract period is a matter of contract; our rule is intended to provide notice to customers at least 30 days prior to the onset of these key contractual events. The final rule adds language that specifies that an assignment or transfer of a customer to another provider (consistent with the contract terms) constitutes a material change requiring customer notice.<sup>17</sup> The final rule also

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<sup>17</sup>The Pennsylvania Commission has added a similar requirement to its rules. See *Order*, Docket No. M-00960890F (Aug. 13, 1998).

clarifies that the required notices can be included in the customer's bill or issued separately at the discretion of the provider. MainePower commented that this provision would unnecessarily increase the cost of marketing to residential customers. In our view, the provision in the final rule achieves a balance between reasonable consumer protection and minimizing provider costs.

7. Section 4(G): Cancellation of Service

Section 4(G) implements the statutory provision, 35-A M.R.S.A. § 3203(4)(A), that competitive providers must provide at least a 30-day notice to a customer prior to contract termination. This notice period applies to generation services only, thus allowing a different notice period for other types of services. The notice of termination or cancellation must be provided to the customer in writing and must be issued in a separate envelope from the customer's bill. While providers may include late payment notices in or with a customer's bill, the provider's notice to the customer that the contract will be canceled (thereby forcing the customer to either "cure" the defect in their performance, seek another provider, or default to the standard offer) should be sent in such a way to assure that the customer has been notified and understands the potential results of the continued default. MainePower requested that competitive providers be able to include the cancellation notice on the customer's bill or in the same envelope with the customer's bill. The Public Advocate supported the provision. We decline to make the change suggested by MainePower. We are concerned that, during the transition to a competitive electricity market, many consumers will simply not understand or be prepared to respond promptly to cancellation notices included in bills.

The section is intended to be implemented in conjunction with the statutory prohibition imposed on T&D utilities that a customer's distribution service cannot be disconnected (or threatened to be disconnected) for the failure to pay unregulated generation service charges. 35-A M.R.S.A. § 3203(14). The rule thus specifies that its provisions cannot be avoided through the installation of pre-payment meters or other devices that automatically discount customers.

The section contains the minimum contents of the cancellation notice. In response to comments from MainePower and CMP, we have deleted the requirement that the notice contain the

telephone number of the T&D utility and instructions on how to obtain standard offer service. Rather, the final rule requires the notice to inform the consumer of the existence of other providers, including the standard offer service. We have deleted the proposed rule's requirement that the providers notify T&D utilities of service cancellation. The process between providers and utilities regarding the assignment of customers is the subject of another rulemaking, Chapter 322.

Finally, the provision specifies that a customer who has had service cancelled and does not chose another competitive provider will default to the standard offer.

8. Section 4(H): Generation Service Bills

This section contains the minimum information and format requirements for bills for generation service, including standard offer service. The requirements are applicable to bills issued for generation service by T&D utilities on behalf of providers and for bills issued directly by providers. The minimum contents of a bill reflect the need for itemizing and unbundling generation service; the final rule has been amended to allow providers discretion with respect to the unbundling of other charges. However, we have retained the requirement that all services and products be identified on the bill so as to avoid customer complaints and concerns about "cramming", a phenomenon in the telecommunications industry in which providers include unknown or unordered services on their bills.

The final rule retains the proposal that the bill for generation service must calculate the customer's actual cents per kWh charged for the volume of kWhs consumed by the customer for the current billing period. Several commenters suggested this provision would be unnecessary and burdensome. However, in our view, this calculation will allow the customer to understand the effect of the provider's price structure on his or her own usage pattern and compare that price structure with those of other providers. The requirements of this subsection are consistent with the statutory directive that the Commission consider requiring standard bill information. 35-A M.R.S.A. § 3203(15).

We have added paragraph (4) to clarify that, when a distribution utility bills for a competitive provider, the provider's charges will be graphically separate to distinguish them from regulated charges.

9. Section 4(I): Do-Not-Call List

Section 4(I) implements the statutory requirement for a "do-not-call" list. 35-A M.R.S.A. § 3203(4)(D). The Commission will provide for this list, but competitive providers must abide by its existence in their telemarketing efforts. In response to comments by GMER, the final rule specifies that providers will be deemed to be in compliance with this rule if they consult and implement the list on a monthly basis. We have also added a provision that customers will be removed from the list after 5 years, and have modified the language to allow for the Commission to employ an outside service to maintain the list.

10. Section 4(J): Protection of Customer Information

Section 4(J) governs the release of customer-specific data by competitive providers. Similar to the rule adopted in Massachusetts, a competitive provider must obtain the customer's written authorization or oral verification by an independent third party to release customer-specific data, such as usage history, bill payment or collection history (except for release of such information for the purpose of collecting the customer's debt owed to the provider or to a credit reporting agency pursuant to the Federal Fair Credit Reporting Act). The rule also allows a customer to obtain his or her usage history from a provider without charge at least once annually. The rule does not address the procedures a T&D utility must follow to release customer-specific data to competitive providers; that issue will be addressed in another rulemaking proceeding.

11. Section 4(K): Unfair or Deceptive Practices

Section 4(K) specifies that the conduct and contracts of competitive providers are subject to the Maine or Federal Unfair Trade Practices Act. We intend to coordinate complaints of this type with the Attorney General and to take that Department's actions into account in our licensing and enforcement activities with respect to providers. No person objected to this provision and it is unchanged from the proposed rule.

12. Section 4(L): Excessive Collection Costs



Section 4(L) prohibits contractual terms that impose excessive collection costs, such as those in excess of reasonable attorney fees or court costs. Preprinted customer contracts should not seek to impose provider-determined damages or other costs other than the typical early termination fees that may apply to a customer who cancels a contract with a specific term. The provision in this regard is modeled on the Maine Consumer Credit Code, Title 9-A of Maine's statutes. No person objected to this provision and it is unchanged from the proposed rule.

13. Section 4(M): Application for Service; Denial of Credit

Section 4(M) incorporates the standards of the Federal Equal Credit Opportunity Act<sup>18</sup> in our customer protection rules. We believe that, by its terms, the federal ECOA will apply to competitive electricity providers. As such, it is appropriate to require, in our rules, that competitive electricity providers adhere to ECOA standards, and to make clear that a finding by an entity of competent jurisdiction that the standards have been violated is a basis for action by the Maine Commission against the licensee. Complaints of this nature will be closely coordinated with the Maine Department of Attorney General, who has primary jurisdiction over the Maine Unfair Trade Practices laws.

MainePower, GMER and ExpressEnergy questioned the need for written application procedures. We have amended this requirement to make clear our intent that all providers should have written internal procedures that govern its application process. We expect that this is routine business procedure in any case. The commenters also objected to the requirement that consumers be informed in writing when they were denied service and questioned whether this provision was intended to impose an obligation to serve on providers. We do not intend to impose an obligation to serve on providers. However, we do require, similar to California's consumer protection rules, that a provider inform a customer of the reason for an application denial. This disclosure can be combined with otherwise applicable disclosures required by the Equal Credit Opportunity Act and the Fair Credit Reporting Act (required when the provider relies on a consumer credit report in a denial or request for

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<sup>18</sup>15 U.S.C. §§ 1691-1691f and Regulation B, 12 C.F.R. §§ 202-202.14.

deposit). However, we have made the rule clear that the notice of denial is not required when the provider declines to provide service based on generic characteristics that are lawful, such as the customer's usage level or customer class.

14. Section 4(N): Conducting Business with  
Unauthorized Entities

Section 4(N) imposes an obligation on providers to use the services of only licensed entities to facilitate or arrange for the sale of electricity to retail customers in this State. This provision is intended to help police the licensing applicability requirements of this Chapter. No person objected to this provision and it is unchanged from the proposed rule.

15. Section 4(O): Dispute Resolution

Section 4(O) contains the Commission's dispute resolution procedures as required by 35-A M.R.S.A. § 3203(8) and establishes the competitive provider's obligation to attempt to resolve complaints and refer dissatisfied customers to the Commission for an informal complaint resolution procedure. The rule is based on the minimum procedural provisions contained in Chapter 810, section 13 of the Commission's rule. While retail customers may well choose providers based in part on their customer service programs and their response to customer calls and inquiries, our proposed rule establishes a minimum level of customer service for all providers. The rule requires providers to accept customer complaints and disputes, investigate them, and report back to customers promptly with their proposed resolution. If a customer is dissatisfied with the provider's resolution, the provider must orally inform the customer of the right to file an informal appeal with the Commission's Consumer Assistance Division (CAD). A customer may appeal a CAD resolution to the Commission. The only comment on this section requested a clarification that the employee referenced in paragraph (1) was not required to devote full time to this complaint handling obligation. We have done so.

E. Section 5: Waiver or Exemption

Section 5 contains the Commission's standard language for a waiver or exemption from the provisions of this Chapter that are not consistent with its purposes or those of Title 35-A. The Public Advocate urged the Commission to provide notice and an opportunity to comment to him and interested persons of waiver

requests. We have not modified our standard waiver language. It is, however, Commission practice to seek input from interested persons before allowing substantial deviation from its rules through general waiver provisions.

Accordingly, we

O R D E R

1. That the attached Chapter 305, Licensing Requirements, Enforcement and Consumer Protection Provisions for Competitive Electric Providers, is hereby adopted;

2. That the Administrative Director shall send copies of this Order and attached rule to:

a. All electric utilities in the State;

b. All persons who have filed with the Commission within the past year a written request for Notice of Rulemaking;

c. All persons on the Commission's list of persons who wish to receive notice of all electric restructuring proceedings;

d. All persons on the service list or who filed comments in the *Public Utilities Commission, Inquiry into Standard Consumer Protection Provisions and Licensing Requirements*, Docket No. 97-590;

e. All persons who filed comments in Docket No. 98-608;

f. The Secretary of State for publication in accordance with 5 M.R.S.A. § 8053(5); and

g. The Executive Director of the Legislative Council, State House Station 115, Augusta, Maine 04333 (20 copies).

Dated at Augusta, Maine, this 3rd day of February, 1999.

BY ORDER OF THE COMMISSION

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Dennis L. Keschl  
Administrative Director

COMMISSIONERS VOTING FOR:      Welch  
   Nugent  
   Diamond